

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. CROIX  
APPELLATE DIVISION

RITA BERRY,	)	
	)	
Appellant, Cross-Appellee	)	
	)	D.C. Civ. App. No. 1997-131
v.	)	
	)	Re. Terr. Ct. 1133/91
ISLAND FINANCE OF THE VIRGIN	)	
ISLANDS,	)	
	)	
Appellee, Cross-Appellant.	)	

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On Appeal From the Territorial Court of the Virgin Islands

Considered: April 21, 1999

Filed: March 21, 2000

**BEFORE:**     **THOMAS K. MOORE**, District Judge, District Court of the Virgin Islands; **STANLEY S. BROTMAN**, Senior Judge of the United States District Court for the District of New Jersey, Sitting by Designation; **BRENDA J. HOLLAR**, Territorial Court Judge, Division of St. Thomas, Sitting by Designation.

**APPEARANCES:**

**Jacqueline Warner Mills, Esq.**  
*for the appellant,*

**Samuel Grey, Esq.**  
*for the appellee.*

OPINION OF THE COURT

PER CURIAM

## **I. INTRODUCTION**

In this appeal, the Territorial Court found that there were no genuine issues of material fact that Rita Berry ["Berry"] owed a balance of \$37.23 to Island Finance of the Virgin Islands ["Island Finance"] and in granting summary judgment in favor of Island Finance. Also pending is a cross-appeal by Island Finance over the denial of its petition for costs and fees.

### **A. Underlying Facts**

On November 21, 1986, Rita Berry executed an unsecured promissory note in the sum of \$3,999.89 in favor of Island Finance of the Virgin Islands. At the same time, she purchased life and disability insurance coverage on the note through Island Finance with ITT Lyndon Insurance Group ["Lyndon"], naming Island Finance as first beneficiary. Berry made payments on the note as agreed until she became disabled in late 1987. Upon her disability, Berry notified her insurer, Lyndon, who made monthly payments beginning November 2, 1987, and ending October 16, 1989, with the final payment. The last payment made by Berry personally was on October 30, 1987, for the period September 22 through October 21, 1987.

Island Finance discovered a balance due following final payment by Lyndon in 1989 and asserted that it had tried to contact Berry for approximately a year without success. In

November of 1990, Berry was finally contacted and paid the balance due, under protest, in December of 1990. A year later, Berry was denied a mortgage loan due to an unsatisfactory credit rating reported by the Credit Bureau of St. Croix ["Credit Bureau"] based on information from Island Finance. Berry filed suit in December of 1991 claiming damages resulting from Island Finances' transmission of erroneous data to the Credit Bureau. The five-count suit alleges negligence, reckless disregard for Berry's credit and wanton and willful behavior resulting in defamation, embarrassment, emotional distress, loss of good reputation and loss of ability to secure financing, causing injury to Berry.

Island Finance moved for summary judgment on the remaining counts on August 23, 1995.<sup>1</sup> The Territorial Court held a summary judgment hearing on April 9, 1997, and ruled from the bench for Island Finance, finding no genuine issues of material fact. Berry's timely appeal argues that genuine issues of material fact remain regarding whether a loan balance amount of \$37.23 existed because of Berry's or Island Finance's inaction and that the Territorial Court erred in granting summary judgment.

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<sup>1</sup> Island Finance had earlier moved for partial summary judgment on Count III (usury) on July 16, 1992, which was granted by the Territorial Court on April 13, 1993.

Following the Territorial Court's bench ruling after argument on the motion for summary judgment on April 9, 1997, Island Finance moved for costs and fees on June 5, 1997, which motion was denied as untimely on August 21, 1997. In issuing its summary judgment on September 18, 1997, the Territorial Court entered its order "*nunc pro tunc* 4/9/97," the date of the summary judgment hearing.<sup>2</sup>

#### **B. The Note and Its Repayment**

The note from Berry to Island Finance called for level payments of \$159.44 per month payable on the 21<sup>st</sup> of each month for a term of 36 months. The first payment was due on December 21, 1986, and the final payment was due on November 21, 1989. The total of the payments was \$5,739.84, with a finance charge amount of \$1,739.95 (\$5,739.84 (total repayment) - \$3,999.89 (loan principal) = \$1,739.95 (finance charge)). Following the final payment by Lyndon, Island Finance discovered that the total payments received both from Berry (through October 21, 1987) and on behalf of Berry by insurer Lyndon (from November 2, 1987 through October 16, 1989), did not amount to the principal and interest figures shown on the face of the note of \$5,739.84. The amount of payments actually received by Island Finance as of the last

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<sup>2</sup> On September 25, Island Finance renewed its motion for costs and fees, which was denied as untimely on October 7, referring to the entry of the earlier order *nunc pro tunc*.

payment by Lyndon totaled \$5,702.61. Island Finance asserts that the difference between this figure and the total note payoff amount represented a balance due from Berry of \$37.23.<sup>3</sup>

Lyndon made its final payment of \$159.44 on the loan on October 21, 1989, and subsequently notified Berry that the loan had been paid in full. Island Finance discovered the disputed loan balance due of \$37.23 by calculating the difference between the "total of payments" due shown on the note and the amounts actually paid.<sup>4</sup>

Over a year after insurer Lyndon's final payment to Island Finance in October, 1989, Island Finance made telephone contact with Berry and informed her of the \$37.23 balance due and payable on the note. On December 12, 1990, Berry paid the \$37.23 amount in dispute, purportedly out of concern for her credit rating. Meanwhile, Island Finance had "charged off" the \$37.23 as an

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<sup>3</sup> Island Finance points to Berry's failure to make payment for the time period from October 21, 1987 through November 2, 1987 (the apparent date that Berry notified Lyndon of her disability and the date Lyndon used as the effective date of its responsibility to pay the note) as the reason the \$37.23 balance remained due. Berry was responsible for payment from October 22, 1987, until Lyndon assumed the note on November 2, 1987 (11 days), and this prorated payment amount of \$37.23 was never paid by Lyndon.

<sup>4</sup> Island Finance asserts that its representatives made repeated attempts to contact Berry following the final payment by Lyndon and balance due discovery, all to no avail. Letters were allegedly sent to Berry's address as indicated on the loan application and note and phone calls were made in an attempt to collect the outstanding balance of \$37.23. Berry counters that, during the time period in question, her address never changed and that Island Finance could have reached her if they so desired. Whether Island Finance attempted to contact Berry regarding the balance due is in dispute, but is also immaterial.

uncollectible loss. This "charge off" notation was reported to the Credit Bureau of St. Croix in the course of Island Finance's day to day business.

In 1991, a year after Berry paid the \$37.23 balance due, she applied for a mortgage loan at the Bank of Nova Scotia. Berry was denied the loan based upon a report from the Credit Bureau of St. Croix indicating unsatisfactory credit. Berry contends that the \$37.23 was never due and payable, a fact disputed by Island Finance, and that she suffered defamation, loss of reputation and the loss of freedom to secure financing as a result of transmission of misinformation from Island Finance to the Credit Bureau of St. Croix.

## **II. ANALYSIS**

### **A. Standard of Review**

This Court has jurisdiction to review the judgments and orders of the Territorial Court in all civil cases. See V.I. CODE ANN. tit. 4 § 33. The Court's review of questions of law is plenary. See *Nibbs v. Roberts*, 31 V.I. 196, 204 (D.V.I. App. Div. 1995).

Federal Rule of Civil Procedure 56 provides that summary judgment may be granted only when the materials of record "show that there is no genuine issue as to any material fact and that

the moving party is entitled to judgment as a matter of law."

*Serbin v. Bora Corp.*, 96 F.3d 66, 69 n.2 (3d Cir. 1996). In deciding whether there is a disputed issue of material fact, the court must grant all reasonable inferences from the evidence to the non-moving party. The threshold inquiry is whether there are "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

Supreme Court decisions mandate that a summary judgment motion must be granted unless the party opposing the motion "provides evidence 'such that a reasonable jury could return a verdict for the nonmoving party.'" *Lawrence v. National Westminster Bank New Jersey*, 98 F.3d 61, 65 (3d Cir. 1996) (quoting *Anderson*, 477 U.S. at 248). Once the moving party has carried its burden of establishing the absence of a genuine issue of material fact, "its opponent must do more than simply show that there is some metaphysical doubt as to material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The non-moving party must "make a showing sufficient to establish the existence of [every] element essential to that party's case, and on which that party will bear the burden of proof at trial." *Serbin*, 96 F.3d at 69 n.2 (quoting *Celotex*

*Corp. v. Catrett*, 477 U.S. 317, 322 (1986)); see also *Quiroga v. Hasbro, Inc.*, 934 F.2d 497, 500 (3d Cir. 1991) (declaring that non-movant may not "rest upon mere allegations, general denials, or . . . vague statements"). Thus, if the non-movant's evidence is merely "colorable" or is "not significantly probative," the court may grant summary judgment. *Anderson*, 477 U.S. at 249-50.

#### **B. Application of Standards to this Case**

At the time that Rita Berry signed the note with Island Finance, V.I. CODE ANN. tit. 9 § 183 read differently than it does today.<sup>5</sup> After delimiting certain maximum finance or interest charges, the statute then in effect continued:

Such charges shall be computed when the loan is made on the principal of the loan for the full term of the loan contract and shall be added to the principal of the loan and the resulting sum shall be the face amount of the note. Every payment may be applied to the combined total of principal and charges until the contract is fully paid. If the contract is prepaid in full by cash, a new loan or otherwise before the final installment date the unearned portion of the charge shall be rebated.

*Id.* In essence, the face amount of the note upon signing is equal to the principal amount plus all interest charges. The only way for Berry to alter this amount was to prepay the loan in its entirety and receive a refund, which she did not do. Therefore, while Lyndon's prepayment of several monthly amounts

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<sup>5</sup> Under the current statutory provisions, this case would not have been appropriate for summary judgment.



would have reduced total interest owed under today's statutory scheme, under the version of section 183 applicable to Berry's loan, such prepayments had no effect on the amount of the finance charge or the total amount owed Island Finance.

Accordingly, Island Finance is correct in maintaining that the \$37.23 was still due on the face amount of the note. Therefore, the Territorial Court did not err in granting summary judgment in favor of Island Finance.

### **III. MOTION FOR ATTORNEY'S FEES**

The Territorial Court announced its findings from the bench after hearing argument on the motion on April 9, 1997, and issued its written opinion on September 18, "*nunc pro tunc* 4/9/97". In the meantime, however, Island Finance had moved for costs and fees on June 5, 1997, which motion was denied as untimely on August 21, 1997. One week after the written opinion in its favor, on September 25, Island Finance renewed its motion for costs and fees, which was denied as untimely on October 7, referring to the entry of the earlier order *nunc pro tunc*.

Federal Rule of Civil Procedure 54(2)(B)<sup>6</sup> provides that "[u]nless otherwise provided by statute or order of the court, [a motion for attorneys fees] must be filed not later than 14 days after entry of judgment . . . ." Federal Rule of Civil Procedure 58 requires that "[e]very judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided by Rule 79(a)."<sup>7</sup> Here, judgment was not entered until September 18, 1997, and a timely motion for attorneys fees was filed one week later on September 25. While the order may have stated that it was effective *nunc pro tunc*, it nevertheless was not entered until September 18, 1997.

Motions for costs and attorneys fees pursuant to 5 V.I.C. §§ 541 & 543 are within the sound discretion of the trial court. See *Bedford v. Pueblo Supermarkets of St. Thomas, Inc.*, 18 V.I. 275, 278 (D.V.I. 1981). A prevailing party is one who has received "at least some of the benefits which were sought in the litigation, even if a judgment is not finally obtained."

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<sup>6</sup> Rule 7 of the Rules of the Territorial Court provides that "[t]he practice and procedure in the Territorial Court shall be governed by the Rules of the Territorial Court and, to the extent not inconsistent therewith, by the . . . Federal Rules of Civil Procedure . . . ."

<sup>7</sup> Rule 79(a) provides, *inter alia*, for the clerk to maintain a "civil docket" and that all filings "shall be entered chronologically in the civil docket on the folio assigned to the action." The Rule continues that "[t]he entry of an order or judgment shall show the date the entry is made." FED. R. CIV. P. 79(a).

*Melendez v. Rivera*, 24 V.I. 63, 65 (Terr. Ct. 1988) (citing *Ingvoldstad v. Kings Wharf Enterprises, Inc.*, 20 V.I. 314 (D.V.I.), *aff'd*, 734 F.2d 5 (3d Cir. 1983)). While Island Finance was the prevailing party, we see no reason for disturbing the Territorial Court's denial of its costs and fees.

#### **IV. CONCLUSION**

The Territorial Court did not err in granting summary judgment to Island Finance, and the summary judgment and order denying costs and fees will be affirmed.

**DATED** this 21st day of March, 2000.

**ATTEST:**  
**ORINN ARNOLD**  
**Clerk of the Court**

By: \_\_\_\_\_/s/\_\_\_\_\_  
Deputy Clerk

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**APPEARANCES:**

**Jacqueline Warner Mills, Esq.**  
*for the appellant,*

**Samuel Grey, Esq.**  
*for the appellee.*

ORDER OF THE COURT

PER CURIAM

For the reasons set forth in the foregoing Memorandum, it is  
hereby

**ORDERED** that the Orders of the Territorial Court granting  
summary judgment in favor of Island Finance and denying the  
motion for costs and fees are **AFFIRMED**.

**ENTERED** this 21st day of March, 2000.

**ATTEST:**  
**ORINN ARNOLD**  
**Clerk of the Court**

**By:** \_\_\_\_\_/s/\_\_\_\_\_  
**Deputy Clerk**

**Copies to:**  
Hon. Thomas K. Moore  
Hon. Stanley S. Brotman  
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All Territorial Court Judges  
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